THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
WILLIAM JOHN ARNOLD,
Appellant.

Opinion
No. 20210286-CA
Filed June 23, 2023

Eighth District Court, Duchesne Department
The Honorable Samuel P. Chiara
No. 201800052

Freyja Johnson, Emily Adams, and Hannah Leavitt-Howell, Attorneys for Appellant, assisted by law students Brock Mason, Christopher Melling, and Hunter Sullivan[1]

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JUDGE DAVID N. MORTENSEN authored this Opinion, in which JUDGES GREGORY K. ORME and RYAN M. HARRIS concurred.

MORTENSEN, Judge:

¶1 William John Arnold's ex-wife, Tabitha,[2] reported to police that one evening Arnold broke into her home and spent the night with her while threatening her with a gun. The undisputed details of the night include Arnold choking Tabitha and punching her in the face, firing the gun into a mirror behind her, driving her

1. *See* Utah R. Jud. Admin. 14-807 (governing law student practice in the courts of Utah).

2. A pseudonym.

around to various locations, trying to convince her to shoot him or else threatening to do "suicide by cop," and leaving the next morning with the gun. The two also had sexual intercourse, which Tabitha testified was not consensual. After a trial, a jury convicted Arnold on nine charges related to these events. Arnold now claims his defense attorney (Counsel) provided ineffective assistance and appeals his convictions on seven of the nine charges: aggravated burglary, aggravated robbery, aggravated kidnapping, aggravated sexual assault, theft, criminal mischief, and felony discharge of a firearm with injury. He asserts that Counsel performed deficiently for failing to (1) object to erroneous jury instructions for the charges of aggravated sexual assault, aggravated kidnapping, and theft; (2) move for a directed verdict on or object to the jury instructions concerning the criminal mischief charge; (3) move for a directed verdict on the charge of discharge of a firearm with injury; and (4) object to Tabitha's testimony that she believed Arnold to be a felon. Arnold argues that he was prejudiced by each of these alleged deficiencies. We ultimately conclude that—for each claimed instance of ineffective assistance—either Counsel did not perform deficiently or Arnold was not prejudiced. As a result, we affirm all of Arnold's convictions.

BACKGROUND[3]

¶2 Arnold and Tabitha shared a "tumultuous, on-again-off-again relationship" for about a decade. The two were divorced just over a year after their marriage, yet they continued their romantic relationship after the divorce despite their recurring fighting. However, by December 2019, Tabitha had evicted Arnold from her home. When he returned later that month,

3. "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. We present conflicting evidence only as necessary to understand issues raised on appeal." *State v. Thomas*, 2019 UT App 177, n.1, 474 P.3d 470 (cleaned up), *cert. denied*, 462 P.3d 804 (Utah 2020).

Tabitha called the police, and officers came and informed Arnold that he was no longer allowed to come to the house. Arnold was supposed to return all the keys he had to Tabitha's home, but he failed to do so.

Arnold Arrives and Assaults Tabitha

¶3 One night in February 2020 at approximately 9:30 p.m., Tabitha was sitting in her home office at her computer and was "startled . . . and scared" to look up and see Arnold standing in the doorway. He had been watching her home from a distance through binoculars for a couple of hours and later admitted that he knew he was not allowed to be there. But he came into the home and told Tabitha he was there to retrieve the title to a pickup truck the two had discussed in the past. Tabitha told Arnold that he had already taken the title and it wasn't there, but he began ransacking her office and then her bedroom looking for it. Arnold was "very, very agitated." Tabitha testified that when she said the truck was technically hers, Arnold grabbed her by the neck and lifted her off the ground. She said she couldn't breathe and feared passing out or dying, so she scratched Arnold's face to try to get loose. Arnold admitted to choking her but claimed her feet remained on the ground and that she scratched him after he let her go. Arnold responded by punching her in the eye with a closed fist. He said he "know[s] she's frail" and "[s]he bruises and breaks easy because all the medication she's on" but that he "barely hit her." Tabitha, on the other hand, said the hit was so hard that she "saw stars" or "a bright light." A later CT scan revealed multiple broken bones around Tabitha's left eye. After Arnold's punch, Tabitha felt dizzy and like she "had a black eye" that was "starting to swell" and "was going to swell so bad it would swell shut." Shortly thereafter she could no longer see out of that eye.

Arnold Obtains and Shoots a Gun

¶4 As Arnold continued ransacking Tabitha's bedroom in search of the title, he found a loaded .22-caliber pistol she had

hidden under her bed. When Counsel later cross-examined Tabitha about the gun, he asked, "He didn't bring his own .22-caliber pistol to your house to kill you, as far as you know, did he?" Tabitha responded, "I believe he is a felon. He's not allowed to own a weapon." On appeal, Arnold claims that Counsel should have objected to this statement. Instead, Counsel said, "Well, that's not my question. He didn't bring a gun to your house, did he?" Tabitha responded, "No, he didn't."

¶5 Arnold admitted that he removed the gun from under Tabitha's bed and that she didn't give it to him, but he said, "I don't think I took it either, but—I mean, 17 years in the oil field giving her my paycheck, I seem to think half of everything is mine." He agreed, though, that no property distribution between the parties had been adjudicated. He relayed that the gun had belonged to Tabitha's ex-husband and had been in pawn when the two "got together" and that Arnold had paid to release it from pawn because she had no money at the time. When the prosecutor asked on cross-examination, "And you didn't have permission to take that gun, did you?" Arnold responded, "Other than the fact that I paid for it." But he agreed that the gun had been in Tabitha's possession when the evening began and that he took it with him when he eventually left Tabitha's home the next morning.

¶6 Tabitha testified that when Arnold picked up the gun he commented, "Somebody's going to die tonight, and I'm going to do suicide by cop." At the time, Tabitha was standing across the bed from Arnold. He chambered a round and, according to Tabitha's testimony, threatened to kill her while he pointed the gun at her head, with her "looking right down the barrel." Arnold fired the gun, and Tabitha testified that the bullet went "[r]ight past [her] head into [her] mirror on [her] dresser" and "through the mirror, into the wall." Arnold testified that he actually pointed the gun at his own head. He claimed, "I wanted to kill myself, and I told her she's going to watch. And I couldn't do it. And then I shot my reflection [in the mirror] . . . ."

¶7 After Arnold shot the gun, Tabitha's ears were ringing from the sound of the shot, and for some time she couldn't hear. Arnold said something to her, but she was unable to hear what he was saying. "[E]ventually," she regained her ability to hear.

¶8 Tabitha told Arnold she wanted a cigarette. Arnold testified, "She said if she's going to die, [she] wants it to be her last one. I told her, 'You're not going to die.' I go, 'I want to die.' And she was just under the impression—she was scared, I guess, after I choked her." Tabitha testified that she had only one cigarette left and Arnold also wanted one, so she suggested that they go to town to get more. She also testified that she was afraid Arnold would kill her and she thought she could get some help in town.

¶9 Arnold eventually agreed to go to town, but before leaving he asked where Tabitha's cell phone was. Tabitha told him it was in her office, and he told her to bring it to him. She did so, and he "beat it violently against [her] bedpost to the point he cracked [her] bedpost [and] completely destroyed [the] cell phone." At trial, the prosecutor asked about damage to the bedpost, to which Tabitha responded that it was cracked and had a "chunk that [was] ready to fall out of it." The prosecutor also asked about the value of the bedpost or the cost of the damage, and Tabitha answered, "That bedpost actually will screw off, and to really fix it you'd have to have another one made. The cost of it, I have no idea." The prosecutor inquired about the value of the cell phone that was destroyed, and Tabitha said, "I think I paid $600 for it. It's got no value now."

Arnold Drives Tabitha to Various Locations

¶10 At approximately 2 or 3 a.m., Arnold and Tabitha left the house to go to town, with Arnold driving Tabitha's car. Tabitha testified that Arnold did not have a driver license because it was revoked after a DUI. Still, Arnold drove and brought the gun, which Tabitha testified was in his lap but Arnold testified was under the seat. Arnold said he didn't kidnap Tabitha but that,

instead, he told her she could leave at any time and she could have done so.

¶11 They drove first to one gas station, but it was closed, so they drove around and eventually went to another. Tabitha said Arnold went into the store and took the keys with him. But Arnold said that he asked her if she wanted him to leave the car running and she said she didn't care, so he turned it off like they usually did and left the keys in the ignition. When asked what Arnold did with the gun when he went into the gas station, Tabitha testified, "I don't remember. I think he took it with him." When the prosecutor asked, "Do you remember seeing it in the vehicle when he left?" she responded, "No." Arnold stated that he left the gun under the seat while he went in the store, but he admitted he didn't "know if she knew where it was at or not."

¶12 Tabitha did not get out of the car. She testified that she stayed in the car because Arnold told her "if [she] ran [she'd] be hunted down and killed." She also said, "I'm old.[4] There is no run left in me. And looking around, it was cold out there and there was nowhere to go for help." Arnold testified that he never said he would hunt Tabitha down nor threatened to kill her. Tabitha testified that while Arnold was in the store, another vehicle pulled up, but she didn't attempt to ask the driver for help because "[i]t was a young man in that truck, and he wasn't a big man." She said, "I thought, I don't want to be responsible for someone else getting hurt over this." She also felt unsure as to whether the man would help her.

¶13 Arnold returned to the car and drove toward the residence of an acquaintance, saying he hated the man and wanted to kill him. But then Arnold stopped the car and handed the gun to Tabitha, instructing her to kill Arnold. Tabitha responded that she couldn't do that. She set the gun on the floor and "was kind of scooting it back under the seat," but Arnold soon asked for the gun back, and Tabitha gave it back to him. She testified that she

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4. Tabitha was fifty-eight years old at the time.

did so because she "didn't want to fight" and she "didn't want to be hurt anymore." Arnold testified that he gave Tabitha the gun four times—twice at the house and twice in the car—to get her to kill him but that "[s]he told [him] she couldn't." He said, "I wanted to get her mad so she would." While they drove, Arnold talked about "all the horrible things that [Tabitha had] done to make his life miserable." Tabitha said she lost track of time and felt like the whole thing was a nightmare. She also testified that she never tried to leave because she "didn't know" and "didn't want to find out" exactly what would happen to her if she tried it; but she said, "I knew he'd come after me."

¶14 Eventually, the pair returned to Tabitha's house, but only to retrieve the binoculars Arnold had earlier been using to watch Tabitha's house. Arnold then drove Tabitha to his residence. Tabitha testified that she still did not feel like she could leave while they drove around because Arnold "would come after" her. She said she still stayed with him because she didn't want to be hurt or have her stuff destroyed, and she "just want[ed] to get through [the] night." They arrived at Arnold's place, and when a police car drove by, Arnold made Tabitha duck down so she couldn't be seen.

¶15 Arnold next took Tabitha to a site where the disputed truck was parked, told Tabitha to get out and drive the truck, and started driving away in Tabitha's car. The truck windows were covered in ice, so Tabitha rolled down the window and stuck her head out to drive, but she hit something as she exited the site, taking the passenger side mirror off. At trial, Arnold postulated that the fractures around Tabitha's eye came from hitting her eye on the truck door during this incident, rather than from his punch. Tabitha testified that she thought about driving to get help but didn't do so because it was very cold, she couldn't see where she was driving, she had already learned from driving around town that there was no one out to provide help, and she didn't know if Arnold would come after her. So instead of driving for help, she used Arnold's taillights as a guide and followed him back to her house.

The Pair Return and Have a Sexual Encounter

¶16 After returning home, Tabitha sat in front of the fireplace because she was "freezing cold." Arnold sat in her living room recliner with the gun in his lap. Tabitha testified that she didn't attempt to call anyone because Arnold would hear her and she "would be hurt or killed" and "wouldn't get any help until it was too late." But Tabitha sent two messages for help while Arnold was in her home—one early in the night (around 9:45 p.m.) to her sister telling her to call 911, and the other through the computer at approximately 4 a.m. to an acquaintance who is a police officer. Tabitha recounted that the later message said "something along the lines of, '911. [Arnold's] here.'" Tabitha did not receive replies at the time.

¶17 At some point, Arnold told Tabitha, "I would like to . . . lay down and hold you in my arms one last time." Tabitha reported that she said, "'Okay,' hoping that maybe he'd fall asleep." Tabitha testified that she was agreeing "[t]o laying down and having [a] snuggle together and hopefully he'd go to sleep" and that she was not wanting or agreeing to anything more than that. Tabitha removed her shoes and pants and lay down with Arnold in the bed. She testified that she took her pants off "[b]ecause they were dirty and [she] didn't want [her] sheets to be all nasty dirty." Tabitha then lay with her back to Arnold's front. She testified that Arnold kept the gun with him and told her, "If I fall asleep, don't you touch that gun."

¶18 Tabitha testified that she felt Arnold getting an erection, and he began pulling on her underwear. She testified, "I can just remember thinking, I have this huge black, swollen eye and everything we've gone through this night, and you want to have sex? . . . Are you nuts?" She testified she was "bawling and saying, 'No. Please, no. No. I don't want to. No.'" She said she "couldn't believe . . . [that] anyone [could] do that to someone and then want to have sex." But Arnold persisted and performed oral sex on Tabitha and then penetrated her vaginally. Throughout this encounter, Tabitha did not physically resist because "she didn't

want to be hurt anymore" and she "just wanted to get through that night." Tabitha testified that Arnold kept the gun on his side of the bed during the sexual encounter. She also said he stated, "Boy, I'm a sick fuck," which Tabitha thought referred "to beat[ing] someone and treat[ing] someone that way and then want[ing] to have sex with them." After intercourse, the pair got cleaned up, and Arnold went to sleep. But Tabitha took pain medication and stayed awake.

¶19 Arnold's testimony regarding the sexual encounter was different. He testified that after Tabitha removed her pants, she got in bed and "crawled . . . literally right up to [him] and start[ed] rubbing on [him] real tight." He admitted that he was warm and Tabitha may have been trying to warm up. He also admitted that Tabitha would sometimes get into bed without pants on and they wouldn't always have sex on such occasions. But he testified that this time, while they had sex, Tabitha didn't resist or pull away. He said, "Actually, when I was going down on her, she was rubbing her fingers through my hair just like she always does. And when I got done and lifted my head up, she—I didn't push her legs up; she pushed her legs up herself, lifted them." He also said, "[W]e've had fights before where we've made up like that." He further claimed, "There's been times where I didn't have sex with her and she told me, you know, 'I got a very high sex drive. If you would have just pushed me a little further, I would have.' And she tells everyone she has a high sex drive." He again stated later, "She said no before and then changed her mind and told me the next day, 'Well, I really wanted to. Why [weren't] you just a little more persistent? You know I got a high sex drive.'"

¶20 Arnold also indicated that, in the past, the two had had sex after Tabitha had been violent toward him. He recounted a time when the pair had gotten into an argument and were throwing each other's clothes out the front door and she got a gun. He stated,

> I went out on the porch and I told her, "If you're going to shoot me, shoot me, then, bitch." And I

> started grabbing my clothes and bringing them back in, and she goes, "You ain't bringing your clothes back in and you ain't stepping back in." And she cocked it back and pointed it at my head, and I grabbed it and pushed it down.
>
> I should have pushed it up, but I wasn't thinking; and I pushed it down and it shot through my leg.

Arnold testified that the pair had sex a week later, and he said he was fully recovered by then. He said that they would "always fight and have sex afterwards," including after occasions when she scratched and hit him. He declared that he believed her feelings on the night in question were like those other, previous times when she said no but the next day "got mad at [him] because [he] wasn't persistent." However, Arnold acknowledged that he did, in fact, hear Tabitha say no two times during the sexual encounter. As to the location of the gun during the encounter, Arnold testified that Tabitha was the one to set the gun on the bed after the last time he told her to shoot him and that it was down by their feet while they had sex.

Arnold Leaves and Tabitha Prompts an Investigation

¶21 Tabitha said that when Arnold woke up, he asked Tabitha for money while holding the gun, and she gave him the money she had in her coat pocket—between ten and fifteen dollars—to get him to leave. Arnold agreed that he asked for money and Tabitha gave it to him before he left. Counsel asked Arnold, after Tabitha initially told him she wanted him to leave the evening before, "Was it your impression or was it not your impression that you were okay to stay there?" Arnold responded, "I knew I probably wasn't okay to stay there."

¶22 After he left, Tabitha said she waited for about fifteen minutes in case he was watching, then crawled from the living room to the landline telephone in her office and called the police.

She said she did this because she thought, "He's gone but he could be watching me. If he sees me get that phone, he's going to come back and get me and I'm going to have to live through more of this."

¶23 Tabitha met with officers that morning and described the events of the night, but she did not initially tell officers that she had been raped. She later explained that she was ashamed and was reluctant to disclose the rape to the officers because "there [were] a bunch of men hanging around" and because of the "huge stigma" associated with rape. But after meeting with the officers, she went to the hospital for an examination, and there she informed medical personnel, who were women, that she had been raped.

¶24 The sexual assault nurse examiner (Nurse) who examined Tabitha at the hospital testified at trial that she remembered Tabitha's exam "far more" than she remembered most exams "[b]ecause of the number of injuries that [Tabitha] had." She testified that she identified various injuries on Tabitha: a black eye that was "quite bruised, quite swollen," bruising on her neck consistent with strangulation, "swelling on the right side of her head," bruising on both elbows, and bruising above both biceps "consistent with having been grabbed." Regarding injuries in Tabitha's vaginal area, Nurse reported "extensive bruising at the posterior of the vaginal wall," bruising of the perihymenal tissue, bruising on the cervix, bruising on the tissue below the vaginal wall, and a laceration on "the outermost part of the inferior vaginal wall." Nurse opined that these injuries were "more consistent" with Tabitha having been sexually assaulted than having had consensual sex. She also testified that, during the exam, Tabitha "expressed fear that she would be killed" and "frequently was tearful and asked, 'Why did this happen[?]'" On cross-examination, Counsel asked Nurse to read a line from her written summary of the account Tabitha gave during the examination, which stated that while driving, Tabitha had "hit something and hit her eye on the door."

¶25 Based on its investigation, the State charged Arnold with (1) attempted aggravated murder; (2) aggravated burglary; (3) aggravated robbery; (4) aggravated kidnapping; (5) aggravated sexual assault; (6) theft; (7) aggravated assault; (8) purchase, transfer, possession or use of a firearm by a restricted person; (9) violation of a protective order; (10) retaliation against a witness, victim, or informant; (11) criminal mischief; and (12) felony discharge of a firearm with injury.

Additional Relevant Testimony Is Given at Trial

¶26 At trial, in addition to the testimonies detailed above, the emergency room doctor testified that a possible side effect of Tabitha's medications was easy bruising, though Nurse indicated that none of Tabitha's listed medications were blood thinners.

¶27 Three deputies (Deputy 1, Deputy 2, and Deputy 3) who responded to Tabitha's 911 call also testified. Deputy 1 testified that when he arrived, he found that Tabitha "had a large . . . swelling to her left eye that was rather significant that caused pretty great alarm," so he requested a medical response to the scene. Deputy 2 testified that Tabitha appeared "[h]ighly emotional" and that "[h]er voice was trembling [and] she was shaking." He also testified, "One of the first things she said to me was that, 'You have to find him, you have to find him. He's going to kill somebody.'" Deputy 3 likewise indicated that Tabitha's eye "was completely swollen shut and blood-filled and couldn't have any visual," that Tabitha was "[v]ery distraught, very emotional," and that "[i]t was very hard for her to complete and construct her sentences and her thoughts." Additionally, Deputy 1 and Deputy 3 testified that Tabitha said she was taking blood thinners.

¶28 Deputy 3 testified about an outstanding protective order against Arnold that Tabitha had obtained in 2012 (before the parties had been married). Deputy 3 testified that the protective order was still active and it prohibited Arnold from going to Tabitha's home and from contacting her via phone, email, or other

methods. On this point, Arnold testified that Tabitha had told him that protective orders go away after two years. And Tabitha testified that she thought the protective order worked both ways and prevented both parties from interacting with each other.

¶29 Deputy 1 and Deputy 3 testified about the bullet hole through the mirror, and Deputy 3 also testified that there were multiple holes in the wall, likely from "fragments of the dresser and . . . the lead [from the bullet] going through that wall." Deputy 3 also testified that he believed the location of a bullet casing he found to be consistent with Tabitha's description of the shooting.

¶30 Deputy 2 testified that he and other officers arrested Arnold at his residence that morning, where they also found the gun. Deputy 3 testified that Arnold had a scratch on his face consistent with Tabitha's account of the events. And he testified that Arnold, upon arrest, had twelve dollars in his pants, also consistent with Tabitha's account.

¶31 Deputy 3 testified that four days later he interviewed Tabitha again and found her "a lot more rational, calm, collected" and able to provide "more detail" into the events, which change, he testified, was normal and expected for victims of these types of crimes. He also testified that a vaginal swab, which had been collected as part of Tabitha's rape examination and subsequently sent to the state lab for testing, matched a sample of Arnold's DNA, which had also been sent to the state lab. On cross-examination, Deputy 3 confirmed that Tabitha had told him that while driving Arnold handed her the gun twice but took it back when she wouldn't shoot him.

The Jury Convicts on Nine Charges

¶32 After all the witnesses testified, the State withdrew the attempted murder charge before submitting the case to the jury. On the charge of possession or use of a firearm by a restricted person, the jury instructions indicated that the parties stipulated that Arnold "was a Category II restricted person at the time of the

alleged offense." The jury deliberated and acquitted Arnold of the charges of violating a protective order and retaliating against a witness, victim, or informant but convicted him of all nine remaining charges. Of these, Arnold now appeals his convictions on seven charges: aggravated burglary, aggravated robbery, aggravated kidnapping, aggravated sexual assault, theft, criminal mischief, and felony discharge of a firearm with injury.

ISSUES AND STANDARD OF REVIEW

¶33 Arnold claims that Counsel provided ineffective assistance and that, accordingly, seven of his convictions should be reversed. Arnold presents several issues, asserting that Counsel was ineffective for (1) not objecting to erroneous jury instructions for the aggravated sexual assault, aggravated kidnapping, and theft charges; (2) not moving for a directed verdict on or objecting to the jury instructions for the criminal mischief charge; (3) not moving for a directed verdict on the discharge of a firearm charge; and (4) not objecting to Tabitha's testimony that she believed Arnold to be a felon.

¶34 "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and [the appellate court] must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *State v. Reid*, 2018 UT App 146, ¶ 17, 427 P.3d 1261 (cleaned up), *cert. denied*, 432 P.3d 1225 (Utah 2018).

ANALYSIS

¶35 "To prevail on a claim of ineffective assistance of counsel, [a defendant] must demonstrate that (1) [defense] counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense." *State v. Streeper*, 2022 UT App 147, ¶ 34,

523 P.3d 710 (cleaned up), *cert. denied*, 527 P.3d 1106 (Utah 2023); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶36 The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.* In other words, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "In evaluating trial counsel's performance, we give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis supporting them." *State v. Liti*, 2015 UT App 186, ¶ 18, 355 P.3d 1078 (cleaned up).

¶37 The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. "Because failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim, we are free to address [a defendant's] claims under either prong." *Honie v. State*, 2014 UT 19, ¶ 31, 342 P.3d 182. We address each of Arnold's assertions of ineffective assistance in turn.

I. Counsel's Failure to Object to Jury Instructions

¶38 Arnold claims, "The jury was not properly instructed on three offenses . . . . Specifically, the jury was not instructed on two elements of aggravated sexual assault (the mens rea for consent and the requirement that a dangerous weapon be used 'in the course' of the crime), key statutory language for aggravated kidnapping, and affirmative defenses to theft." He asserts that

"[C]ounsel's failure to object to the erroneous instructions or propose correct instructions constituted ineffective assistance . . . ." "Absent some tactical explanation, defense counsel's failure to object to a jury instruction that does not alert the jury to every element of the crime with which [the defendant] was charged constitutes deficient performance." *State v. Liti*, 2015 UT App 186, ¶ 18, 355 P.3d 1078 (cleaned up).

¶39 Even if we assume without deciding that Counsel's performance was deficient in this respect, Utah and United States caselaw indicate:

> A proper analysis also needs to focus on the evidence before the jury and whether the jury could reasonably have found that . . . a failure to instruct the jury properly undermines confidence in the verdict. . . . A court must consider the totality of the evidence before the judge or jury and then ask if the defendant has met the burden of showing that . . . there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Ultimately, a reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Garcia, 2017 UT 53, ¶ 42, 424 P.3d 171 (cleaned up) (discussing *Strickland v. Washington*, 466 U.S. 668, 694–96 (1984)). After considering the totality of the evidence presented to the jury, we conclude that Arnold was not prejudiced by any of the erroneous jury instructions. We address each of the relevant jury instructions in turn.

A. Aggravated Sexual Assault

¶40 Arnold first alleges ineffective assistance because Counsel did not object to the jury instruction on sexual assault based on two errors. The instruction in question read,

> You cannot convict him of this offense unless you find beyond a reasonable doubt based on the evidence each of the following . . . elements: that [Arnold] did knowingly, intentionally, or recklessly have sexual intercourse with [Tabitha] without her consent and used or threatened her with the use of a dangerous weapon.

Arnold asserts that this instruction failed to properly instruct the jury on the mens rea requirement for this charge and failed to provide the statutory language that the use or threat of use of the dangerous weapon must have occurred "in the course of" the sexual assault. *See* Utah Code § 76-5-405(2)(a).

1. The Mens Rea Requirement

¶41 Our supreme court has explained that "the crime of rape requires proof not only that a defendant 'knowingly, intentionally, or recklessly had sexual intercourse,' but also that [the defendant] had the requisite mens rea as to the victim's nonconsent." *State v. Barela*, 2015 UT 22, ¶ 26, 349 P.3d 676. This means a jury should be instructed that a defendant accused of rape must have acted knowingly, intentionally, or recklessly *as to the victim's nonconsent*.[5]

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5. We echo our supreme court's declaration that "going forward, . . . district courts should ensure that jury instructions for rape clearly require a finding that a defendant had the requisite mens rea as to the victim's nonconsent." *State v. Newton*, 2020 UT 24, ¶ 29, 466 P.3d 135 (cleaned up). Recent decisions clearly indicate that the district court ought to ensure the correctness of these instructions. *See State v. Barela*, 2015 UT 22, ¶¶ 25–27, 30, 349 P.3d 676; *State v. Norton*, 2021 UT 2, ¶ 51, 481 P.3d 445. Our supreme court endorsed the use of Model Utah Jury Instruction 1605:

(continued…)

¶42 "A person engages in conduct . . . [r]ecklessly with respect to circumstances surrounding [the actor's] conduct or the result of [the actor's] conduct when [the actor] is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." Utah Code § 76-2-103(3).

¶43 In *State v. Barela*, 2015 UT 22, 349 P.3d 676, a massage therapist and client presented different accounts of a sexual encounter, with the therapist testifying that the client initiated and engaged in sex and the client testifying that the therapist—without encouragement or consent—inappropriately rubbed her inner thigh during the massage and then penetrated her vaginally, *id.* ¶¶ 5–7. In evaluating a jury instruction very similar to the one at issue here, *id.* ¶ 25, our supreme court concluded that "reasonable trial counsel should have objected to it," *id.* ¶ 27. And the court ultimately determined that the faulty jury instruction

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> (DEFENDANT'S NAME) is charged [in Count__] with committing Rape [on or about DATE]. You cannot convict [him][her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
> 1. (DEFENDANT'S NAME);
> 2. Intentionally, knowingly, or recklessly had sexual intercourse with (VICTIM'S NAME);
> 3. Without (VICTIM'S NAME)'s consent; and
> 4. (DEFENDANT'S NAME) acted with intent, knowledge or recklessness that (VICTIM'S NAME) did not consent.

Newton, 2020 UT 24, ¶ 29 (brackets in original) (quoting Model Utah Jury Instructions 2d CR1605 (2015), https://legacy.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=44#1605 [https://perma.cc/S78Q-PSHF]).

was prejudicial to the defendant. *Id.* ¶ 32. Later, discussing *Barela* in another case, the court explained,

> This court found that the evidence was such that a jury could have "thought that the truth fell somewhere in between the two accounts." While the victim in that case said the defendant had suddenly instigated and perpetrated the intercourse without her consent, she testified that she "froze," "neither actively participating in sex nor speaking any words," and otherwise expressed no reaction. This court concluded that a jury could have believed that although the victim did not consent, the defendant may have mistakenly thought she did. Accordingly, we held that it was "reasonably likely" that a proper jury instruction regarding the requisite mental state as to the victim's nonconsent could have affected the outcome of the trial.

State v. Norton, 2021 UT 2, ¶¶ 48–49, 481 P.3d 445 (cleaned up).

¶44 On the other hand, in *State v. Newton*, 2020 UT 24, 466 P.3d 135, our supreme court found that a defendant was not prejudiced as a result of similarly deficient jury instructions, *id.* ¶¶ 19, 30. The defendant faced rape charges based on the victim's account that, after a party, the defendant attacked her in his car and violently forced her to have sex despite her screaming, crying, and fighting back and that he also choked her and pointed a gun at her. *Id.* ¶ 4. The defendant told a different story, claiming that the victim initiated and participated willingly in sex. *Id.* ¶ 6. The court determined that the defendant was not prejudiced because neither version presented the possibility that the victim didn't consent but the defendant reasonably believed she did. *Id.* ¶ 34. The court explained that because "the evidence shows only that she either fought back or initiated the sex[,] . . . the jury could not easily have thought that the truth fell somewhere in between the two accounts." *Id.* (cleaned up). "So in convicting [the defendant],

the jury must have found that [the victim] did not consent and, by extension, must have concluded that [the defendant] intentionally, knowingly, or recklessly had nonconsensual sexual intercourse with [the victim]." *Id.* (cleaned up). The court noted that the victim's version of the events was also corroborated by extensive injuries identified during her medical examination, including genital injuries that would have been painful enough for her to stop consensual intercourse, evidence of strangulation, and bruising on her arms and legs. *Id.* ¶ 35. Accordingly, the court concluded that the evidence supported a jury determination that the defendant was at least reckless as to the victim's consent. *See id.* ¶¶ 35–36. Because its confidence in the outcome was not undermined, the court found no prejudice. *See id.*

¶45 Likewise, in *State v. Norton*, 2021 UT 2, 481 P.3d 445, our supreme court held that similar instructions were not prejudicial, *id.* ¶¶ 38–39, 49–51. There, a woman accused her estranged husband—against whom she had a protective order—of breaking into her parents' home, assaulting her and tying her up with duct tape, abducting her, and forcibly penetrating her vaginally while holding her down. *Id.* ¶¶ 1, 5–9. She testified that she said "no" repeatedly and also physically resisted. *Id.* ¶¶ 8–9. The estranged husband, on the other hand, described how the wife willingly left with him and initiated physical affection that resulted in consensual sex. *Id.* ¶¶ 14–16. He testified that the pair later argued and "rastled," including him backhanding her and grabbing her hands. *Id.* ¶ 17. The jury convicted the husband of aggravated sexual assault and other charges, and he argued on appeal that the jury instructions were prejudicial because they did not identify the mens rea regarding consent. *Id.* ¶¶ 20, 33. Our supreme court disagreed, concluding that "a reasonable jury could not have found that [the husband] mistook [the wife's] conduct for consent based on the totality of the evidence." *Id.* ¶ 42. This was because the husband's "testimony did not describe ambiguous behavior that he could have believed was consent," the wife's "testimony similarly left no room for a finding that [the husband] mistook her conduct for consent," and "[o]ther evidence corroborated her version of events"—including the use of duct

tape and injuries on the wife's back, face, inner thighs, and labia. *Id.* ¶¶ 43–45.

¶46 The State argues that "[t]he facts here contain none of the subtlety that drove the result in *Barela*. Rather, as in *Newton* and *Norton*, the only issue was whose version of consent to believe." We disagree. Unlike in *Newton* and *Norton*, Arnold's and Tabitha's accounts are not so very different that the jury must have chosen to believe one at the complete exclusion of the other. Both testified that Tabitha took off her pants, climbed in the bed, and lay with Arnold and that sex subsequently ensued. To be sure, the parties' descriptions contained other contradictory facts. But we first acknowledge that this case is unlike *Newton* and *Norton*, where neither party testified to behavior that could have been construed to be ambiguous. *See Norton*, 2021 UT 2, ¶ 43; *Newton*, 2020 UT 24, ¶ 34. Indeed, Tabitha admitted that she did not physically resist Arnold because she "didn't want to be hurt more," and Arnold testified that Tabitha ran her hands through his hair as she normally would during oral sex and lifted her legs up on her own. In this respect, the present case is more like *Barela*, where there was behavior that was potentially ambiguous. *See* 2015 UT 22, ¶ 29.

¶47 However, unlike in *Barela*, both Arnold and Tabitha testified that Tabitha said "no," with Tabitha stating that she did so repeatedly while sobbing and Arnold admitting that he heard her say "no" twice. We consider it critical to accept that "[n]o means no." *State v. Cady*, 2018 UT App 8, ¶ 1, 414 P.3d 974, *cert. denied*, 421 P.3d 439 (Utah 2018). By admitting that Tabitha said no twice, Arnold would have to convince us that some exceptional circumstances applied to make it reasonable for him to believe that no—stated twice—actually meant yes. As explained below, he fails to accomplish this feat. While we agree with Arnold that this case is less straightforward than *Newton* and *Norton* and disagree with the State's contention that "as in *Newton* and *Norton*, the only issue was whose version of consent to believe," on the record before us, our agreement with Arnold on this point does not carry the day for him. Ultimately, we are not convinced that,

on these facts, a reasonable jury could have looked "at the totality of the trial evidence here and [found] that, under either version of events, [Arnold] may have mistaken [Tabitha's] conduct for consent." *See Norton*, 2021 UT 2, ¶ 49.

¶48 Arnold asserts that the parties' history made it reasonable for him to believe that Tabitha was consenting when she said "no." He testified: "There's been times where I didn't have sex with her and she told me, you know, 'I got a very high sex drive. If you would have just pushed me a little further, I would have.'" He also claimed that "[s]he said no before and then changed her mind and told me the next day, 'Well, I really wanted to. Why [weren't] you just a little more persistent? You know I got a high sex drive.'" But Arnold's own testimony does not support a conclusion that he could have reasonably supposed that *this* was a time when Tabitha just wanted him to be more persistent.

¶49 First, we note that nothing in Arnold's description of the parties' past sexual history indicates that Arnold ever successfully changed Tabitha's mind during the course of a sexual encounter. Her alleged statements on days after the couple did not have sex do not establish a history where Tabitha first said "no" but changed her mind during the course of sex—and her feelings on consent the day after not having sex do not reliably establish her feelings on consent at the time. But the more important question is whether Arnold could have reasonably believed Tabitha's noes to be yeses here.

¶50 Arnold testified that the couple "had fights before where [they] made up like that," meaning having sex, including after she "scratched and hit" him, as well as a week after she shot him in the leg, when he had fully recovered. Even if true, this testimony does not provide evidence of a single instance when Tabitha consented to having sex contemporaneously with Arnold physically assaulting her (rather than after she injured him), and it does not raise a reasonable inference or basis to conclude that she would have consented so soon after Arnold punched her in

the face, breaking her facial bones, when her eye was still so swollen that she couldn't open it.

¶51 But Arnold's own testimony is even more damning. When speaking of Tabitha's feelings that she was going to die that night, Arnold said, "And she was just under the impression—she was scared, I guess, after I choked her." This shows his awareness that Tabitha was afraid for her life, which is not consistent with him reasonably believing that—despite saying no—she was willing to have sex with him. Certainly, some hours had passed between Arnold's punch and the sexual encounter, but we are not convinced that Arnold could have reasonably believed that Tabitha's fear turned into consent for sexual activity.

¶52 Furthermore, Arnold's testimony was clear that he knew he was not welcome at Tabitha's home both before he arrived and throughout the time he stayed. Arnold agreed when the prosecutor asked if he knew he wasn't "supposed to be at her house" but "still went over anyways." And the prosecutor confirmed, "So you came in the house uninvited, knew you weren't supposed to be there; is that correct?" Arnold responded, "Yes." The prosecutor then asked, "She told you to leave, but you didn't leave?" and again Arnold replied, "Yes." Separately, when Counsel was questioning Arnold about the circumstances around him leaving Tabitha's home in the morning, he asked Arnold, "Was it your impression or was it not your impression that you were okay to stay there?" Arnold responded, "I knew I probably wasn't okay to stay there." It is beyond the limits of reasonability to believe that Arnold knew throughout the whole night that Tabitha was not okay with him staying in her home but that he thought she wanted to have sex with him in that very home. Therefore, Arnold's testimony does not support a conclusion that he reasonably believed Tabitha was consenting to sex despite twice telling him no, and a correction to the jury instruction would not likely have made any difference on this point.

¶53 Beyond Arnold's testimony, other evidence supports a conclusion that "a reasonable jury could not have found that

[Arnold] mistook [Tabitha's] conduct for consent based on the totality of the evidence." *Norton*, 2021 UT 2, ¶ 42. First, it is clear that the jury believed more of Tabitha's version of the events than Arnold's. Because the chief dispute on this point at trial was whether the sexual encounter was consensual, the jury's guilty verdict for aggravated sexual assault indicates that the jury accepted Tabitha's facts, or at least more of Tabitha's facts than Arnold's.[6] Tabitha testified that she "just kept bawling and saying, 'No. Please, no. No. I don't want to. No.'" She stated that Arnold said, "Boy, I'm a sick fuck," presumably referring—in Tabitha's estimation—"to beat[ing] someone and treat[ing] someone that way and then want[ing] to have sex with them." Tabitha's sobbing would certainly have informed Arnold that she was not consenting to sex. And Arnold's statement indicates that he understood (1) that his desire to have sex with Tabitha was extremely perverse—even given their history—after his previous actions and (2) that she would view his desire as just as shocking as she, in reality, did.

¶54 Additionally, Nurse testified that Tabitha had extensive injuries that were "more consistent" with Tabitha having been sexually assaulted than having had consensual sex. Even if the jury accepted Arnold's theory that blood thinners could have caused the extensive bruising during consensual sex, they would not have caused a laceration on the "outermost part of the inferior vaginal wall." This is similar to the injuries the court highlighted in both *Newton* and *Norton* as weighing against a finding of prejudice. *See id.* ¶ 45; *Newton*, 2020 UT 24, ¶ 35. And this is particularly similar to the injuries in *Newton* that the court reasoned would likely have caused the victim to stop the intercourse if it had been consensual. *See Newton*, 2020 UT 24, ¶ 35. Arnold provides no explanation that would support Tabitha's desire to engage in such a painful encounter, including no

6. While the jury did acquit Arnold on two charges, neither charge was related to the sexual encounter, and we have no other indication that the jury disbelieved Tabitha's testimony on this point.

testimony that the couple's history involved sex that was painful for Tabitha. Nurse also testified that Tabitha "expressed fear that she would be killed" and "frequently was tearful and asked, 'Why did this happen[?]'" These facts are consistent with Tabitha's account of her feelings about the experience and do not support a finding that Arnold was anything but reckless—or worse—as to Tabitha's nonconsent.

¶55 Finally, we find it worth noting that the jury's attention was drawn to Arnold's state of mind before it convicted him on this count. In its closing argument, the State said, describing the sexual encounter, that Arnold claimed to be thinking, "Well, this is how we've had sex in the past . . . so that's what we should do. That's what's going on." But the State drew the jury's attention to facts that would make Arnold's alleged perception unreasonable, saying he claimed to have thought that "[e]ven though she was telling him no, was crying because he had punched her in the face, had choked her and shot at her, driven her all over town, that—well, she still wanted to have sex." Then the State asked, "That doesn't make sense, does it? When you look at this evidence you should look at things. Is it reasonable? Does that make sense?" Given this, it is very likely that the jury did consider Arnold's state of mind as to Tabitha's consent when it convicted him on this charge. The State specifically drew the jury's attention to the unreasonable nature of Arnold's purported beliefs about Tabitha's consent, and the jury returned a verdict that Arnold was guilty on this count.

¶56 It is clear that Arnold acted recklessly—at the very least—as to Tabitha's consent when he was "aware of but consciously disregard[ed] a substantial and unjustifiable risk" that she was not consenting to have sex. *See* Utah Code § 76-2-103(3). Disregarding this risk in light of Tabitha verbally stating she was not willing to have sex and in light of the very painful injuries she had sustained was "a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from [Arnold's] standpoint." *See id.* In light of the totality of the circumstances, including Arnold's own

testimony, it is unlikely that the outcome would have been different if the jury had heard an instruction on Arnold's mens rea related to Tabitha's consent. Therefore, the erroneous jury instructions on this point did not prejudice Arnold.

2. The "in the course of" Language

¶57 Arnold next argues that Counsel was ineffective for not objecting to the jury instruction for aggravated sexual assault when it failed to indicate that the use or threat of use of the dangerous weapon must have occurred "in the course of" the sexual assault. *See id.* § 76-5-405(2)(a)(i). Even if we assume without deciding that this omission constituted deficient performance, we conclude that Arnold was not prejudiced by it. The totality of the evidence presented to the jury indicates that Arnold's use of the gun presented a continuous threat and that this threat extended through the course of the sexual assault.

¶58 As discussed above, the supreme court in *Norton* found no prejudice deriving from a faulty jury instruction on aggravated sexual assault. 2021 UT 2, ¶ 51. Though the "in the course of" language was not omitted in the jury instruction at issue there, the circumstances of the use of the gun are relevant to this case. After the victim's estranged husband broke into her house, punched her in the face, and drove her to another location with a gun in his lap, *id.* ¶¶ 5–6—circumstances very similar to what happened here—

> [the husband] led [the victim] into an office and told her to take off her pants. She . . . said "no," and he again pointed the gun at her, forcing her to comply. While she did so, [he] undressed, removed the magazine from the gun, and put the magazine and gun in a filing cabinet. Then, he told [her] that they were going to have sex. She said "no," but [he] responded that "yes" they were. "So you're going to rape me?" she asked. [He] replied, "You can't rape somebody that you're married to."

Id. ¶ 8. Notably, the gun was stored in a filing cabinet during the rape—less accessible than was the gun here, as it stayed within arm's reach on the bed. Although Norton made his victim undress at gunpoint, while here Tabitha removed her pants voluntarily, the removal of clothing was not the act constituting sexual assault. Norton's conviction on the charge of sexual assault based on rape supports an understanding that the "in the course of" language can be satisfied through an ongoing threat present during the rape.

¶59 This understanding comports with the plain meaning of the statute and with Utah caselaw—both as to threat of use of a weapon and as to use of a weapon. *See generally Bevan v. State*, 2021 UT App 107, ¶ 11, 499 P.3d 191 ("For all questions of statutory interpretation, we begin by looking at the plain language. In doing so, we assume that the legislature used each term advisedly according to its ordinary and usually accepted meaning. . . . Should we conclude the language is unambiguous and provides a workable result, our analysis is complete." (cleaned up)). First, while the plain meaning of "threatens" includes "utter[ing] threats against" someone, *see Threaten*, Merriam-Webster, https://www.merriam-webster.com/dictionary/threaten [https://perma.cc/QDE8-JD58], it also includes "caus[ing] to feel insecure or anxious," *see id.* Where the actor has already issued verbal threats related to the dangerous weapon or has taken physical action threatening use of the gun—such as pointing it at the victim or firing it, *see State v. Hodson*, 907 P.2d 1155, 1157 (Utah 1995) ("We conclude . . . that the only possible inference to be made when someone holds a loaded gun to the head of another and issues an order is that failure to comply will result in use of the gun. Implicit threats are as real as express verbal threats . . . .")—a threat may continue while the weapon continues to be accessible to the actor. The language of the statute does not state differently, and we have no reason to read into "threatens" a temporal restriction it does not contain. *See* Utah Code § 76-5-405(2)(a)(i). So to satisfy this element, Arnold need not have pointed a loaded gun toward Tabitha during the actual sexual encounter and threatened to shoot her if she did not comply. Rather, it was

sufficient for him to have earlier established the threat of use of the gun through words or actions and for that threat to continue during the course of the sexual assault.[7]

¶60 Furthermore, Utah law is clear that the phrase "use of," *see id.*, does not require an actor to take affirmative action besides presenting the weapon, *see In re R.G.B.*, 597 P.2d 1333, 1335 (Utah 1979) ("Defendant . . . argues that there was no evidence of . . . the use of a deadly weapon . . . since the robber did not handle the gun or point it at the victim . . . . [I]t is not necessary that the State prove that the robber actually pointed a gun at the victim . . . . If merely exhibiting the gun creates fear in the victim, it constitutes 'use of a firearm' for that purpose."); *State v. Weisberg*, 2002 UT App 434, ¶¶ 15–17, 62 P.3d 457 ("[The defendant] objected to the portion of the instruction that equated 'use' to 'exhibiting a weapon in such a manner that it creates fear in a reasonable person.' [The defendant] argues that this portion of the instruction incorrectly stated the law, because it did not require an active employment of the weapon . . . . We are unpersuaded . . . . A

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7. In several cases, we have determined that the "in the course of" language is satisfied if the defendant threatens to use a gun but the victim never sees it, even if the gun is fictitious. *See State v. Bryant*, 965 P.2d 539, 541, 545–46 (Utah Ct. App. 1998) (concluding that a threat of use of an unseen—and possibly fictitious—gun occurred "in the course of" a sexual assault where the defendant threatened to kill the victim if she failed to give him her money (cleaned up)); *see also State v. Meza*, 2011 UT App 260, ¶¶ 2, 11, 263 P.3d 424 (determining that the State provided sufficient evidence that the defendant threatened use of a gun "in the course of" an aggravated robbery where he gestured as if he had a gun in his pocket and stated, "This is a stickup." (cleaned up)). It makes little sense to recognize this as a qualifying threat but to take the narrow view that a real and present gun's use does not occur "in the course of" a sexual assault if a defendant threatens use of the weapon or uses it before the sexual assault but does not again verbally state the threat or wield the gun while actually engaging in sexual activity.

weapon is used even if it is never actually pointed at a victim, so long as exhibiting the weapon creates fear in the victim." (cleaned up)).

¶61 Like in *Norton*, the evidence of what occurred before the sexual assault established a backdrop of physical violence and an ongoing threat of harm with the gun. Both Tabitha and Arnold testified that Arnold choked Tabitha and hit her, so the jury would have no questions about whether Tabitha knew that Arnold was willing to hurt her. Both parties also testified that Arnold shot the gun very close to Tabitha, so the jury would have no doubts as to Tabitha's understanding that Arnold was willing to do this—or worse—with the gun later. Tabitha testified that Arnold shot at her and threatened to kill her with the gun, and while Arnold testified that he shot at his own reflection and never threatened to kill Tabitha, he did admit that Tabitha spoke as if he was going to kill her and that "she was just under the impression—she was scared, I guess, after I choked her." Accordingly, he was aware that she feared him killing her and believed it was a real possibility.

¶62 Additionally, both parties agreed that Arnold was in control of the gun when the pair began driving. And while Tabitha and Arnold disagreed about how many times Arnold handed the gun to Tabitha throughout the night, both testified that he did so, that he instructed her to kill him, and that he got the gun back after she refused to do so. Arnold suggests that his actions of repeatedly handing the gun to Tabitha indicate that he was not threatening her with the weapon. The State argues, instead, that "acts of giving Tabitha the gun and asking her to shoot him could be reasonably viewed as acts of manipulation and intimidation, not opportunities for her to escape." We are persuaded that the jury accepted this interpretation because it found Arnold guilty of kidnapping even though he testified that Tabitha was free to leave anytime and because Arnold testified that, despite Tabitha telling Arnold she couldn't kill him, he said he "wanted to get her mad so she would." Other than during these incidents—after which Arnold admittedly took back the

gun—and the time that Arnold was in the store (when he testified that he left the gun under the seat but didn't "know if she knew where it was at or not" and she testified that she didn't know where it was), Arnold controlled the gun until the time of the sexual assault. In other words, we do not view the testimony about the events prior to the sexual assault—including testimony that Arnold handed the gun to Tabitha multiple times—as evidence supporting any conclusion other than that there existed a continuous threat of harm by Arnold against Tabitha.

¶63 Moreover, the evidence related to the sexual assault itself does not support a conclusion that had the jury instruction included the "in the course of" language, the jury would likely have acquitted Arnold on this count. Both Arnold and Tabitha testified that the gun remained on the bed—easily accessible to Arnold—during the sexual assault. While Arnold testified that Tabitha was the one to place it there, the testimony from both individuals described above does not support an inference that Tabitha felt like she was free to do what she wanted with the gun or that she stopped feeling threatened by the gun during the sexual assault. Tabitha testified that Arnold kept the gun on his side of the bed during the sexual encounter. This testimony was consistent with Arnold's own narrative about regaining control of the gun each time he gave it to Tabitha. Additionally, the jury heard both Arnold and Tabitha testify that Tabitha repeatedly said no during the sexual encounter, yet Arnold proceeded to engage in sexual intercourse. It also heard Tabitha testify that she did not physically resist because she "didn't want to be hurt anymore" and she "just wanted to get through that night." It is likely that the jury interpreted these statements as meaning that during the sexual encounter, Tabitha felt threatened by Arnold's continued control over the gun, so she did not resist for the sake of her life and her safety. Based on the totality of the circumstances, it is unlikely that the jury would have acquitted Arnold on this charge even if it had been instructed as Arnold now claims it should have been. Accordingly, we are satisfied that Arnold was not prejudiced by the omission of the "in the course of" language in the jury instruction.

B. Aggravated Kidnapping

¶64 Arnold next argues that Counsel was ineffective for not objecting when the same language—"in the course of"—was left out of the jury instruction for the aggravated kidnapping charge. Under the relevant statute, a defendant must commit an enumerated act—as relevant here, using or threatening to use a dangerous weapon, acting with the intent to inflict bodily injury or terrorize, or acting with the intent to commit a sexual assault—"in the course of" a kidnapping or unlawful detention. *See* Utah Code § 76-5-302(2). The jury did not specify which enumerated act it based its determination of guilt on for this charge, but—even if we assume without deciding that Counsel performed deficiently—we have no difficulty concluding that the "in the course of" language was satisfied and that the jury would not have reached a different outcome had the instruction been different.

¶65 Many of Arnold's actions satisfied the elements of this charge, including the "in the course of" language. Importantly, the jury instruction clearly indicated to jurors that kidnapping occurred if Arnold "detain[ed] or restrain[ed] [Tabitha] for any substantial period of time" or "under circumstances exposing her to risk of bodily injury." Accordingly, the jury would have understood that the kidnapping could have taken place before, after, or during the driving. While we do not know which moment or stretch of time the jury found Tabitha to have been detained or restrained (including potentially the whole night), we are comfortable in concluding that the jury believed Arnold to have simultaneously committed one of the enumerated acts. If the jury believed that Tabitha was detained or restrained while Arnold ransacked her house and choked and punched her, Arnold was acting at that time with the intent to inflict bodily injury or terrorize Tabitha. If the jury found that Tabitha was detained while Arnold took her loaded gun and shot it very close to her, he acted simultaneously to—at least—use a dangerous weapon. If the kidnapping occurred during the drive, Arnold's testimony establishes that he only gave the gun to Tabitha briefly several

times then took it back, and we have already explained why we are not persuaded that such actions removed the threat of the gun. And if the jury found that Arnold detained Tabitha during what it classified as a sexual assault, then he also used the gun and detained her intentionally to commit that sexual assault. Simply put, we are convinced that, at any time the jury may have identified for the time of the kidnapping, it would have determined that Arnold simultaneously committed one or more enumerated acts. Thus, Arnold was not prejudiced by this alleged error.

C. Theft

1. Affirmative Defenses

¶66 Arnold next argues that Counsel was ineffective for not ensuring that the jury instruction on theft included reference to affirmative defenses that may have applied to Arnold. The theft count was based on Arnold's alleged theft of the gun, and there are two affirmative defenses that Arnold argues should have been presented to the jury: that Arnold "acted under an honest claim of right" to the gun or that he "acted in the honest belief that [he] had the right to obtain or exercise control over" the gun. *See* Utah Code § 76-6-402(3)(a)–(b). Arnold points to where he testified, "I don't think I took it either, but—I mean, 17 years in the oil field giving her my paycheck, I seem to think half of everything is mine." And when the prosecutor asked, "[Y]ou didn't have permission to take that gun, did you?" Arnold responded, "Other than the fact that I paid for it." He did not testify that he purchased the gun but that he had paid to release the gun, which had belonged to Tabitha's ex-husband, from pawn.

¶67 The State responds that Counsel did not perform deficiently by not requesting these instructions because they were foreclosed by the facts. The State points to the statutory language that "[i]t is not a defense . . . that the actor . . . has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe." *See id.* § 76-6-402(2). We

agree with the State. Arnold admitted that the gun was previously at Tabitha's house and in her possession, that his ownership rights to it were never adjudicated, that Tabitha did not give him the gun, and that he took the gun to his home when he eventually left Tabitha's house. So even if Arnold thought he had some sort of property interest in the gun, he acknowledged that Tabitha did as well. And he did not provide any convincing argument as to why he was entitled to infringe on Tabitha's property interest. *See State v. Murphy*, 617 P.2d 399, 406 n.9 (Utah 1980) (Hall, J., dissenting) ("Note that even a person with an interest in the property can 'steal' it from another with an interest."); *State v. Larsen*, 834 P.2d 586, 590–91 (Utah Ct. App. 1992) ("One may be prosecuted for theft if he takes the property of another, although the actor had an interest in it. . . . [This] comprehensive definition of property is intended to abrogate whatever still survives of the artificial common-law restrictions on the scope of larceny and the other theft offenses." (cleaned up)), *cert denied*, 843 P.2d 1042 (Utah 1992). Therefore, the affirmative defenses were not available to Arnold, and it was neither deficient performance nor prejudicial for Counsel not to request instructions on them.[8]

8. We are also unconvinced that the jury would have believed that Arnold had an "honest claim of right to" or an "honest belief that [he] had the right to obtain or exercise control over" the gun, *see* Utah Code § 76-6-402(3)(a)–(b), given that Arnold stipulated to the fact that he was a Category II restricted person. While the jury did not know the details of why Arnold fell into this category, it is common knowledge that restricted persons are not legally able to possess, use, or control firearms in this state. *See id*. § 76-10-503(2)(a), (3)(a). We think it practically certain that at least one juror would have raised this point with respect to the affirmative defenses. Counsel's decision not to draw attention to this point and to avoid inviting additional focus on Arnold's status—as well as speculation as to its cause—was not unreasonable.

2. Implications for Aggravated Burglary

¶68 In line with his argument on the theft instruction, Arnold asserts that instructing the jury about the affirmative defenses would also raise a reasonable doubt as to Arnold's intent to steal the gun, thereby impacting the aggravated burglary charge.[9] Because we are not convinced by Arnold's argument on the theft instruction, we conclude that there would have been no likely impact on the aggravated burglary conviction if Counsel had sought instructions on the affirmative defenses to theft.

II. The Criminal Mischief Charge

¶69 Arnold next argues that Counsel performed deficiently in several ways related to the criminal mischief charge. Arnold asserts that Counsel's errors prejudiced him because he was charged with class A misdemeanor criminal mischief rather than class B misdemeanor criminal mischief. Class A misdemeanor criminal mischief applies when "the actor's conduct cause[d] or [was] intended to cause pecuniary loss equal to or in excess of $500 but . . . less than $1,500 in value." Utah Code § 76-6-

9. This charge could also rely on Arnold's intent to assault Tabitha. *See id.* §§ 76-6-202(2)(c), -203(2). Arnold argues that, under the applicable statute, the State was required to prove that he formed the necessary intent when he entered her house. He is wrong. "[T]he plain language of the statute requires that the actor's intent be formed at the time of entry *or* at any time while the actor remains unlawfully in the building or dwelling." *State v. Garcia*, 2010 UT App 196, ¶ 13, 236 P.3d 853 (emphasis added), *cert. denied*, 247 P.3d 774 (Utah 2011). "Moreover, in interpreting this statute, the Utah Supreme Court has concluded that 'a person is guilty of burglary under Utah Code section 76-6-202(1) if [that person] forms the intent to commit a felony, theft, or assault at the time [the person] unlawfully enters a building or at any time thereafter while [the person] continues to remain there unlawfully.'" *Id.* (cleaned up) (quoting *State v. Rudolph*, 970 P.2d 1221, 1229 (Utah 1998)).

106(3)(d)(iii). But a loss with a value of less than $500 is a class B misdemeanor. *Id.* § 76-6-106(3)(d)(iv). Arnold asserts that the jury was not instructed on the statutory criteria for valuing property for this chapter of the code, which defines value as "(i) the market value of the property, if totally destroyed, at the time and place of the offense, or where cost of replacement exceeds the market value; or (ii) where the market value cannot be ascertained, the cost of repairing or replacing the property within a reasonable time following the offense." *Id.* § 76-6-101(1)(f). The statute further specifies that "[i]f the property damaged has a value that cannot be ascertained by [this] criteria . . . , the property shall be considered to have a value less than $500." *Id.* § 76-6-101(3).

¶70 However, the State argues that a different definition applies to value here. The criminal mischief statute indicates that "[i]n determining the value of damages under this section, . . . the value of any item . . . includes the measurable value of the loss of use of the items and the measurable cost to replace or restore the items." *Id.* § 76-6-106(4). Because we, as a rule, apply the more specific definition where there is conflict, *see, e.g.*, *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 31, 70 P.3d 1 ("When two statutory provisions appear to conflict, the more specific provision will govern over the more general provision." (cleaned up)), and because this latter definition explicitly applies to this section while the other applies to the chapter, *compare* Utah Code § 76-6-104(4), *with id.* § 76-6-101(1)(f), (3), it applies insofar as the definitions conflict.

¶71 Arnold does not dispute that he destroyed Tabitha's cell phone, but he argues that Counsel should have taken action after the State provided insufficient evidence of its value. On the question of the cell phone's value, the only testimony was Tabitha's when she, in response to being asked, "And what's the value of your cell phone? What does it cost?" stated, "I think I paid $600 for it. It's got no value now." Based on this, Arnold argues that "the State failed to produce competent evidence that Tabitha's phone had a market value of at least $500 at the time it broke; nor did it put on evidence of a repair or replacement cost."

Accordingly, Arnold argues that Counsel performed deficiently by failing to move for a directed verdict on this point or ask that the charge be reduced to a class B misdemeanor, as well as for failing to request a jury instruction on calculating value.

¶72 We agree with the State, however, that Counsel did not perform deficiently by not taking any of these steps. In reviewing Counsel's actions, we apply "a strong presumption that Counsel's representation was within the wide range of reasonable professional assistance," *see Harrington v. Richter*, 562 U.S. 86, 104 (2011) (cleaned up), and that Counsel's decisions were "sound trial strategy," *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (cleaned up). Here, we conclude that Counsel's decisions were sound because, "[u]nlike a later reviewing court, [Counsel] observed the relevant proceedings, knew of materials outside the record, and interacted with the client [and] with opposing counsel." *See Harrington*, 562 U.S. at 105.

¶73 The State argues that Counsel could have reasonably expected that either of the indicated actions would have been futile.[10] We agree that Counsel could reasonably have believed that, had he done as Arnold now desires, the court would have allowed the State to present evidence on the value of the cell

10. Under Utah law, owners are "presumed to be familiar with the value of [their] possessions" and are "competent to testify on the present market value of [their] property." *State v. Purcell*, 711 P.2d 243, 245 (Utah 1985). On an assertion of insufficient evidence, a "trial court is not obligated to select a value figure specifically tied to any particular testimony. Rather, evidence will be deemed to support the value set by the fact finder if it is within the range testified to." *State v. Anderson*, 2004 UT App 131U, para. 7. While we are not evaluating the sufficiency of the evidence here, given this backdrop it was objectively reasonable for Counsel to believe that the court would have denied a motion for directed verdict based on Tabitha's testimony.

phone and any other damaged property.[11] *See* Utah R. Crim. P. 17(f)(5) (indicating that after the parties present their cases-in-chief, "the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits"); *see also* Utah R. Evid. 611(a)(1) ("The court should exercise reasonable control over the mode and order of . . . presenting evidence so as to make those procedures effective for determining the truth . . . ."). Because there is no record evidence that the cell phone's value was actually less than $500 and that Counsel knew of its lower value, we cannot conclude that Counsel acted deficiently in this respect. Arnold bears the burden of proof, so "it should go without saying that the absence of evidence cannot overcome the strong presumption that Counsel's conduct fell within the wide range of reasonable professional assistance." *See Burt v. Titlow*, 571 U.S. 12, 17 (2013) (cleaned up). Given our strong presumption that Counsel acted reasonably and strategically according to his knowledge of facts outside the record—which here may have included the make, model, age, condition, and replacement cost of the phone—we conclude that Counsel acted objectively reasonably and that his performance was not deficient on this point.[12]

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11. The cell phone was not the only property of Tabitha's that Arnold damaged. He also ruined her bedpost by violently smashing the cell phone against it, and Tabitha testified that repair would require a new post. Additionally, he shot through Tabitha's mirror, leaving a hole and "a shatter mark." This action also made holes in the wall behind the mirror. Given all this, it was further reasonable for Counsel to believe that he would ultimately be unsuccessful in taking the actions Arnold desires.

12. We are also convinced that Counsel was objectively reasonable in determining that requesting a jury instruction on valuation risked alienating the jury. Arnold was facing many charges, nine of which were felonies and involved actions much more egregious than damaging property. Counsel could have wisely decided that

(continued…)

III. Counsel's Failure to Request a Directed Verdict on the Discharge of Firearm with Injury Count

¶74 Arnold next argues that Counsel was ineffective for failing to move for a directed verdict on the second-degree felony discharge of a firearm with injury count. This charge requires proof that a defendant's discharge of a firearm "cause[d] bodily injury to any individual." Utah Code § 76-10-508.1(2). The statute defines "bodily injury" as "physical pain, illness, or any impairment of physical condition." *Id.* § 76-1-101.5(4). Arnold argues that reasonable counsel would have realized that Tabitha's testimony did not satisfy this element and would have moved for a directed verdict on this charge.

¶75 Tabitha testified that after Arnold shot the gun, she "couldn't hear" and her ears "were ringing." She knew that Arnold was saying something to her, but for a time she couldn't hear or understand what he was saying. She was "eventually" able to hear again.

¶76 Arnold argues that this testimony does not establish "impairment." *See id.* The State disagrees, emphasizing that the statute includes "*any* impairment," *see id.* (emphasis added), and pointing out that "substantial bodily injury"—a higher tier of injury in the criminal context, *see State v. Lyden*, 2020 UT App 66, ¶ 24, 464 P.3d 1155—includes "*temporary* loss or impairment of the function of any bodily member or organ," *see* Utah Code § 76-1-101.5(18) (emphasis added). We agree with the State. The plain

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bickering over the value of the phone and the other property—which Arnold did not dispute destroying and which highlights his violence on the evening in question—would not be helpful. Doing so would challenge Tabitha's testimony as to value without impacting her credibility (Arnold does not assert that her testimony on this point was erroneous), and it was objectively reasonable for Counsel to focus his efforts combatting Tabitha's testimony on weightier issues, like whether Arnold detained her and raped her.

meaning of "impairment" is "diminishment or loss of function or ability." *See Impairment*, Merriam-Webster, https://www.merriam-webster.com/dictionary/impairment [https://perma.cc/3B2E-M2EY]. Tabitha testified that—for a time—her function of hearing was diminished or entirely lost; this satisfies the plain meaning of impairment.[13] Arnold does not argue that permanent hearing loss would fail to qualify under the statute, nor does he provide any authority supporting a position that a condition that would qualify as impairment if it were permanent fails to qualify if it is temporary. Indeed, a higher tier of bodily injury includes temporary impairment, *see* Utah Code § 76-1-101.5(18), so we see no reason to read the broad language of this definition as excluding temporary conditions, *see State v. Robinson*, 2018 UT App 227, ¶ 33, 438 P.3d 35 (describing the definition as "broad"), *cert. denied*, 440 P.3d 694 (Utah 2019). Accordingly, we conclude that Arnold was not prejudiced when Counsel chose not to move for a directed verdict on this charge.

IV. Counsel's Failure to Object to Tabitha's Testimony that She Believed Arnold Was a Felon

¶77 Finally, Arnold argues that Counsel was ineffective for not objecting or requesting a corrective instruction when Tabitha testified that she believed Arnold was a felon. Counsel asked Tabitha, "He didn't bring his own .22-caliber pistol to your house to kill you, as far as you know, did he?" Tabitha responded, "I believe he is a felon. He's not allowed to own a weapon." Arnold

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13. While the legislature may not have intended this language to have such broad effect as to include a temporary reduction in hearing ability or an impairment that is so temporary as to last for mere minutes, we are bound to apply the plain language of the statute. *See, e.g.*, *Bevan v. State*, 2021 UT App 107, ¶ 11, 499 P.3d 191. Moreover, the statute does not place any temporal qualification on "physical pain," *see* Utah Code § 76-1-101.5(4), which may often be quite temporary. But if the legislature intended the language to be narrower than we suggest on this or any other point, it has the power to modify this language.

argues that this statement was inadmissible and that Counsel performed deficiently by not taking corrective action when he knew that the testimony was harmful. Presumably, Arnold stipulated to his status as a Category II restricted person to avoid drawing unnecessary attention to his criminal history. Arnold cites *State v. Larrabee*, 2013 UT 70, 321 P.3d 1136, for the proposition that "although a defense attorney can reasonably choose to not object so to not highlight harmful testimony, that failure to object is unreasonable when the inadmissible evidence is inflammatory," *id.* ¶¶ 26–28, 32. Arnold asserts that "evidence of [his] felon status was inflammatory, and it was harmful to [him], especially in a case that depended heavily on [his] credibility."

¶78 The State counters, "[T]he testimony did not tell the jury that [Arnold] was, in fact, a felon. Rather, Tabitha said only that she 'believe[d]' [Arnold] was." Further, it states that "even if Tabitha had testified that [Arnold] was a convicted felon, competent counsel could . . . reasonably conclude that objecting risked further emphasizing the testimony, especially where [C]ounsel would have to ask the court to instruct the jury to disregard what it had already heard."

¶79 We agree with the State. "Utah courts have long recognized that [defense] counsel's decision not to request an available curative instruction may be construed as sound trial strategy." *State v. Popp*, 2019 UT App 173, ¶ 50, 453 P.3d 657 (cleaned up), *cert. denied*, 485 P.3d 943 (Utah 2021). "Indeed, a curative instruction may actually serve to draw the jury's attention toward the subject matter of the instruction and further emphasize the issue the instruction is attempting to cure." *Id.* Counsel could have reasonably determined that he would be "ill-advised to call undue attention to the testimony," "particularly when [it was] unanticipated and brief," *see State v. Squires*, 2019 UT App 113, ¶ 43, 446 P.3d 581 (cleaned up), and particularly when the jury was already aware that Arnold was a Category II restricted person and was, accordingly, not permitted to use or

possess a firearm.[14] Tabitha's comment was made in passing and was made as to her belief rather than as to any certainty of Arnold's felony status. Accordingly, we conclude that Counsel did not perform deficiently by deciding not to draw further attention to the issue of Arnold's criminal history.

CONCLUSION

¶80 Arnold ultimately does not demonstrate that he received ineffective assistance of counsel. We conclude that—on each of Arnold's claims—he fails to show deficient performance, prejudice, or both. Therefore, we affirm his various convictions.

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14. This point also makes it unlikely that Tabitha's testimony prejudiced Arnold. Tabitha's testimony did not include details of any alleged crimes that would likely impact the jury's determination of Arnold's credibility beyond what its knowledge of his status as a restricted person would.